BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

68755

In the Matter of American Society of Travel Agents, Inc. and Joseph L. Galloway, Complainants, v. United Air Lines, Inc., American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., Continental Airlines, Inc., US Airways, Inc., Trans World Airlines, Inc., America West Airlines, Inc., Alaska Airlines, Inc., American Trans Air, Horizon Air Industries, Inc., Midwest Express, Inc., Air Canada, KLM Royal Dutch Airlines, TACA International Airlines, Inc., and Air France, Respondents.	Docket OST-99-6410-14 ANSWER OF US AIRWAYS, INC. TO COMPLAINT

ANSWER OF US AIRWAYS, INC. TO THE COMPLAINT OF THE AMERICAN SOCIETY OF TRAVEL AGENTS AND JOSEPH GALLOWAY

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December 10, 1999

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Pursuant to 14 C.F.R. § 302.204, US Airways, Inc. ("US Airways") hereby answers the Complaint of the American Society of Travel Agents ("ASTA") and Joseph Galloway ("Galloway") (collectively, "Complainants") filed in Docket OST-99-6410.[1]

I. BACKGROUND.

US Airways has long enjoyed successful relationships with its travel agents throughout the country. Travel agents have been, and remain, an important distribution channel for US Airways, accounting for the majority of the carrier's ticket sales. Like all carriers,

[1] The Department extended the deadline for answering the Complaint until December 10, 1999.

however, US Airways is constantly evaluating economic conditions in the marketplace and, when necessary, adjusting to these conditions. Distribution costs are no exception. Recently, marketplace forces, driven in large part by new technologies, have dictated that US Airways effectively reduce its base travel agent commissions in order to remain competitive with other carriers in the industry. Therefore, in accordance with the standard ARC Agent Reporting Agreement, which provides that the compensation paid to travel agents for the sale of air transportation shall be established by the carrier, US Airways reduced its base commission rate to five percent. (US Airways Press Release, dated October 13, 1999.)

In response to the commission reduction, Complainants seek an order against the Respondents pursuant to 49 U.S.C. § 41712 to "cease and desist immediately" from "reductions in travel agent commission rates from eight percent to five percent" because such reductions purportedly constitute "an unfair method of competition in air transportation or the sale of air transportation." (Compl. at 24.) When one reads the Complaint in its entirety, it is clear that the Complainants are requesting that the Department re-regulate airline ticket commissions and mandate a specific mode and cost of distribution for the sale of air transportation. In effect, Complainants want to set the regulatory clock back two decades by insisting that the Department set the base commission rate at eight percent. Their Complaint is fundamentally flawed in several critical respects.

- Since deregulation, the Department and its predecessor, the Civil Aeronautics Board ("CAB"), have uniformly stated that market forces, not legislation or regulatory action, should determine commission rates and fares. Currently codified U.S. aviation policy reinforces this principle.

- It is well established under federal caselaw and Department precedent that travel agents are "agents" of the airlines for whom they sell tickets. As such, there is no competition between travel agents and carriers.

- Neither section 417 12, which gives the Department authority to monitor whether an air carrier has engaged in unfair or deceptive practices or unfair methods of competition, nor its predecessor, section 411 of the Federal Aviation Act of 1958, has ever been used to regulate the principal/agent relationship of air carriers and their travel agents or as a vehicle to set rates.

US Airways faces intense competition in the aviation industry and is constantly evaluating and adjusting its practices to remain competitive with other airlines. In the case at hand, competitive forces in the marketplace compelled US Airways to reduce its commission rate. Complainants ask the Department to impose a specific commission rate on US Airways, thereby eliminating US Airways' ability to adjust to competitive conditions in the marketplace. This request conflicts directly with the Airline Deregulation Act and longstanding Department and CAB precedent and has no basis in law or fact. Accordingly, US Airways requests that the Department dismiss the Complaint filed by ASTA and Galloway.

II. CONGRESS AND THE DEPARTMENT HAVE ALREADY REJECTED COMPLAINANTS' REQUEST BY MAKING CLEAR THAT MARKET FORCES – NOT LEGISLATION OR RE-REGULATION – SHOULD DETERMINE COMMISSION RATES AND FARES IN THE AIRLINE INDUSTRY.

In 1978, Congress concluded that the public interest would best be served if free market forces, not government regulation, drove the development of all economic aspects of the airline industry. Accordingly, the Airline Deregulation Act ("ADA,') was enacted, "significantly alter[ing] the policy directives that guide the Board's consideration of agreements" and ushering in an era of "even greater reliance on the free interplay of actual and potential competitive forces." Order 79-9-65. With this new policy directive, the CAB determined that the relationship between travel agents and airlines, including the commissions paid to travel agents, should be subject to market forces. See, e.g., Order 79-9-65 ("Unless there are compelling

arguments to the contrary, the marketplace should determine the level of travel agent commissions"); Order 83-3-127 ("we concluded that the only assurance that commissions are reasonable can come from the operation of the unfettered marketplace"); cf. Order 82-12-85 ("Absent a demonstration that the public would be better served by solutions that cannot be attained in a competitive environment, the air transportation marketing industry must be opened to the normal operation of market forces.").

The Department of Transportation has since endorsed this view on several occasions:

> "Under our enforcement policy, we [DOT] do not consider incentive programs or the payment of different levels of commissions to affect competition adversely when the only effect is to divert passengers from one airline or ticket agent to another. . . . [T]he Federal Aviation Act protects competition, not individual competitors." (Order 92-2-46, at 9.)

Most recently, in DOT Order 99-4-19, at 5, the Department reiterated:

> "[A]s a general matter, we [DOT] have consistently read the pro-competitive policy directives in 49 U.S.C. § 40101 as allowing each airline the same freedom to choose the channels and the terms for distributing its services that firms in other unregulated industries enjoy."

Indeed, 49 U.S.C. § 40101 (a)(12) expressly dictates that U.S. aviation policy should "rely[] on actual and potential competition (A) to provide efficiency, innovation, and low prices and (B) to decide on the variety and quality of, and determine prices for, air transportation services."

To issue the cease-and-desist order sought by Complainants and to declare that recent "reductions in travel agent commission rates from eight percent to five percent" constitute "an unfair method of competition in air transportation" (Compl. at 24) would fly in the face of more than twenty years of Department and CAB precedent and currently codified U.S. aviation policy. As such, Complainants' request must be rejected.

III. THE COMPLAINT DOES NOT SET FORTH ANY COGNIZABLE CLAIM OF UNFAIR COMPETITION AGAINST US AIRWAYS.

It is well established that airlines and travel agents are not competitors. Instead, as federal courts and the Department have long recognized, their relationship is one of principal and agent. See, e.g., Illinois Corporate Travel v. American Airlines, 889 F.2d 751 (7th Cir. 1989); Pacific Travel Int'l v. American Airlines, Inc., Order 95-1-2. Because an agent has a duty not to compete with its principal regarding the subject of the agency, claims of unfair competition by travel agents, as the agent, against US Airways, the principal, are by definition baseless.

In Illinois Corporate Travel, the Seventh Circuit confirmed that "travel agents" – a "telling phrase" – have an agent-principal relationship with airlines. 889 F.2d at 753 ("Travel service operators are 'agents' for the purposes of antitrust law when they sell tickets for air carriers' accounts."). As a matter of law, there is no competition between a principal and its agents. See Illinois Corporate Travel v. American Airlines, 700 F. Supp. 1485, 1492 (N.D. Ill. 1988), aff'd, 889 F.2d 751 (7th Cir. 1989); 2d Restatement of Law, Agency § 393. Because travel agents do not compete with airlines, and claims of unfair competition in such relationships are without merit.

The Department reached this same conclusion in Pacific Travel International v. American Airlines, where the complaint alleged that American had "unfairly competed" against Pacific International and other travel agents by requiring them to collect payments for discounted tickets within 24 hours of the reservation while waiving the 24-hour rule for tickets booked directly with American. See Order 95-1-2, at 1. The Department dismissed the complaint, observing that Pacific "was operating as American's agent" and must "obey all of the reasonable directions" of the principal, namely American. Id. at 6; see also Order 82-12-85 ("In writing the

ticket, the travel agent acts as that particular carrier's agent on the transaction."). The Department further concluded: "As the principal, American is entitled to impose reasonable restrictions on its agent's sales of American's services." Order 95-1-2, at 4-5.

In light of this clear judicial and Departmental precedent, Complainants' request for an order prohibiting US Airways and other carriers from reducing travel agent commissions to five percent should be rejected. As the Seventh Circuit made clear: "If the travel business is a genuine agency relation, then the principal is no less entitled to decide between commission and piecework rates than it is entitled to decide the net price for its product." 889 F.2d at 752.[2]

IV. THE COMPLAINT DOES NOT SHOW ANY COGNIZABLE CONSUMER HARM.

The Complainants have also failed to demonstrate any consumer harm resulting from the purportedly "unfair practice" of reducing travel agent commissions. This failure is not surprising because US Airways' efforts to control costs and adjust to a changing competitive landscape increases its efficiency, thereby enabling it to provide better service at lower prices. It would establish a troubling precedent if the Department (as Complainants request) prevents carriers in the deregulated airline industry from implementing a business decision that will reduce the cost of air travel for consumers and enable carriers to remain competitive, without compromising safety in any manner whatsoever. Congress has made clear that the United States – the world's leader in air transportation – should rely "on actual and potential competition" to provide efficiency and innovation, and to determine prices for air transportation services. 49 U.S.C. § 40101(a)(12). Such efficiency and innovation will, in turn, lead to lower costs for

[2] Travel agents authorized to issue tickets on US Airways' flights must enter into the standard ARC Agent Reporting Agreement which provides that the compensation paid to travel agents for the sale of air transportation shall be established by the carrier.

consumers. The relief requested by Complainants will only add to the cost of air transportation for consumers.

V. SPECIFIC RESPONSES.[3]

In accordance with 14 C.F.R. § 302.207(b), US Airways specifically answers the "allegations" contained in the Complaint:

1. US Airways is without knowledge sufficient to admit or deny the allegations of the section of the Complaint titled "Complainants." (pp. 3-4.)

2. US Airways admits that it is a certificated U.S. "air carrier" as alleged in the section of the Complaint titled "Respondents." (p. 4.)

3. US Airways specifically denies that 49 U.S.C. § 41712, referenced in the section titled "Statutory Framework," is relevant or otherwise applicable to the allegations in the Complaint. US Airways further alleges that the section titled "Statutory Framework" asserts legal conclusions and contains no affirmative allegations, and thus no admissions or denials are warranted. (pp. 4-7.)

4. US Airways alleges that the section titled "Economic Background: Travel Agents & Competition" contains no affirmative allegations, and thus no admissions or denials are warranted, except: US Airways specifically denies that it has "conclude[d] that travel agents were an obstacle to [its] objectives;" US Airways is without knowledge sufficient to admit or deny the allegation regarding travel agent market share for air transportation; and US Airways is without knowledge sufficient to admit or deny the allegation about travel agencies' doing "well . . . in the early 1990's." (pp. 8-10.)

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[3] The 24-page Complaint has very few affirmative allegations that require an admission or denial. However, to the extent the Department believes there are affirmative allegations in the Complaint warranting admissions or denials that US Airways does not sufficiently address here, US Airways reserves its right to answer such allegations when the Department identifies such allegations.

5. US Airways alleges that the section titled "Non-compensatory Commission Policies" contains no affirmative allegations, and thus no admissions or denials are warranted, except: US Airways specifically denies that it has "embarked on a campaign to eliminate or . . . severely impair the public's access to travel agents;" US Airways admits that it has unilaterally adjusted its travel agent commission rates on various occasions, including, most recently, from eight percent to five percent; and US Airways specifically denies that commission reductions and cornmission caps have been a "major factor" in the exit of independent travel agents from the industry. (pp. 10- 11.)

6. US Airways alleges that the section titled "The Cost Squeeze" contains no affirmative allegations, and thus no admissions or denials are warranted, except: US Airways denies that it has taken actions intended to and having the effect of raising agent costs and impairing travel agency efficiency. (pp. 1 1-19.)

7. US Airways alleges that the section titled "Discussion" contains no affirmative allegations, and thus no admissions or denials are warranted. (pp. 19-21.)

8. US Airways alleges that the section titled "Conclusion" contains no affirmative allegations, and thus no admissions or denials are warranted. (pp. 22-23.)

9. In response to Complainants' prayer for relief, US Airways requests that the Department dismiss the Complaint.

VI. AFFIRMATIVE DEFENSES.

1. The Complaint fails to allege a cause of action upon which relief can be granted.

2. The relief sought in the Complaint is contrary to the policies and intent underlying the Airline Deregulation Act. The relief sought by Complainants is barred by statute, or otherwise contrary to the terms of the ADA.

3. The relief sought in the Complaint is contrary to the well-established decisions and precedent of certain federal courts, the Department, and the CAB. It is also contrary to the Department's long-standing policy that market forces, not legislation or government intervention, should determine commission rates and fares in the provision of air transportation.

4. The Department does not have the authority to provide the relief sought in the Complaint.

5. Some allegations relate to actions that are required or approved by the Department, or otherwise in furtherance of its policies.

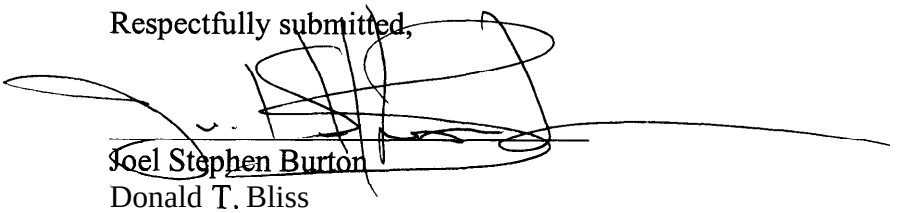
VII. CONCLUSION.

Innovative new technologies and increased competition are driving air transportation distribution costs down. As a result, air carriers have been forced to reevaluate their methods of distribution, and, when necessary, adjust those practices in order to reflect the changing economic conditions in the marketplace. By seeking to control costs and to adjust to a changing competitive landscape, US Airways will be able to provide more efficient and less costly service, all of which benefit the traveling public. This was the goal of deregulation. Mandating a specific commission rate, as Complainants ask the Department to do, will conflict directly with the ADA. It will also inject the Government into economic micro-management and re-regulation of air transportation, thereby undoing over twenty years of Department and CAB precedent.

Long ago, the Board made clear that "we approach arguments that competition is necessarily destructive and that government intervention is preferable to the free marketplace *with a large measure of skepticism."* (Order 82-12-85 (emphasis added).) With or without skepticism, the Complaint by ASTA and Galloway is fatally flawed in numerous respects.

WHEREFORE, US Airways respectfully requests that the Department dismiss the complaint of ASTA and Mr. Galloway.

Respectfully submitted,



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